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No.

In The

Supreme Court of the United States

October Term, 1997

RONALD J. TURNER, as Administrator of the Estate of CHARLOTTE M. TURNER, and individually,

Petitioner,

vs.

FALLON COMMUNITY HEALTH PLAN, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether or not as a matter of law ERISA preempts all state law rights and remedies in an instance where the Petitioner alleges that the Petitioner's intestate was denied rights and benefits due her under an insurance contract as a result of arbitrary, illegal, capricious and unreasonable decisions by the Respondent which were not made in good faith and which were a breach of Respondent's fiduciary duty to the Petitioner's intestate.

B. Whether or not as matter of law the federal court is obligated to establish a federal common law remedy with respect to violations of ERISA for which no remedies are specifically set forth under ERISA.

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Petitioner Ronald J. Turner, Executor of the estate of Charlotte Turner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on October 20, 1997.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 127 F.3d 196 (1st Cir 1997). The two opinions of the District Court are unreported. All of the said decisions are reproduced as an Appendix at the end of this petition.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 12. The judgment of the Court of Appeals was entered on October 20, 1997.

STATUTORY PROVISION INVOLVED

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA")

STATEMENT OF THE CASE

This case arises out of the death of Charlotte M. Turner. Petitioner, Ronald J. Turner, individually and as administrator of the Estate of Charlotte M. Turner, brought this matter in the Massachusetts Superior Court alleging claims of breach of contract, breach of implied covenant of good faith and fair dealing, wrongful death, loss of consortium and negligent and/or intentional infliction of emotional distress. Respondent, Fallon Community Health Plan, Inc., removed the case to the United States District Court for the District of Massachusetts,

at which time Petitioner amended his Complaint to state a claim under ERISA and agreed to voluntarily dismiss, without prejudice, the state law claims while reserving his right to assert them at a later time. The ERISA claim alleged a denial of benefits that was arbitrary, illegal, capricious, unreasonable and not made in good faith and was a breach of fiduciary duty.

Shortly thereafter, the Respondent filed a Motion for Summary Judgment with respect to which Petitioner filed a Motion under Fed. R. Civ. P. 56(f) for a Continuance so that he could conduct the necessary discovery to oppose Respondent's Motion. By a Memorandum and Order dated May 10, 1996 ("Order"), the District Court (Gorton, J.) denied the Motion for Continuance. In doing so, the Court acknowledged that "Plaintiff has made an authoritative proffer in a timely manner of the facts which Plaintiff seeks to discover." The District Court, however, ruled that Petitioner's attempts to defeat the Motion would be futile because

> ERISA preempts any claim plaintiff could raise against Fallon, and that Mrs. Turner's death has effectively eliminated any chance of recovery under that statute.

By its ruling, ("First Ruling") the District Court raised issues theretofore not raised by the parties.

Petitioner then filed a Motion for Reconsideration to address the preemption issue raised *sua sponte* by the District Court and a Motion to Amend Complaint to reassert his state law claims.

By Memorandum and Order dated February 5, 1997, ("Second Ruling") the District Court denied the Petitioner's Motion for Reconsideration, denied the Petitioner's Motion to

Amend the Complaint to add state law claims and granted the Respondent's Motion for Summary Judgment.

The matter was appealed to the United States Court of Appeals for the First Circuit. It was argued before the Court and a decision was issued by the court on October 20, 1997.

The Petitioner appealed therefrom by filing this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The legal issues in the case at bar have importance that far transcend the case involving the Petitioner's decedent, Charlotte Turner, (hereinafter referred to as "Charlotte").

Charlotte was a registered nurse, a wife and a mother of two children. She was diagnosed as having breast cancer. Her husband worked for General Motors Corporation and Charlotte had a health care insurance plan through General Motors Corporation. General Motors Corporation contracted with Fallon Community Health Plan, Inc. ("Fallon") to administer the said plan. Charlotte's cancer had metastasized. Normal chemotherapy was not a viable treatment. Although Fallon, by written contract, had excluded bone marrow transplants for solid tumors (such as Charlotte's) the plan had been amended to provide for bone marrow transplant under a technique or program carried on by Dana Farber, a well known hospital specializing in the treatment of cancer and located in Boston, Massachusetts. However, Charlotte did not qualify for the Dana Farber treatment because of the type of cancer that she had and the fact that it had spread to too many areas of her body. Fallon had further amended its plan so that treatment by institutions other than Dana-Farber would be considered on a case by case basis; and a determination of whether or not any such other institution was suitable to

provide treatment would be made by a committee of Fallon employees. Both Charlotte's oncologist who was associated with Fallon and another doctor who was associated with Fallon recommended that Charlotte be sent to Duke University's Medical School ("Duke") for a special treatment for Charlotte's type of cancer. Said treatment was considered by the doctors to be the best and only chance for assistance in prolonging Charlotte's life. Over thirty insurance companies had agreed to cover the cost of the type of treatment that was being considered at Duke. Charlotte had to go through the in-house appellate process of Fallon and, notwithstanding the fact that two of Fallon's doctors recommended it, Fallon's committee refused to pay the $100,000 or more cost associated with the treatment at Duke. By the time the committee hearings were over and the in-house appellate procedure was over, the cancer had spread too far and Duke was no longer a viable treatment. Charlotte died shortly thereafter.

The situation as it exists today is that the legal principles that appear to govern Charlotte and people in Charlotte's position are as follows: ERISA does not have any specific provision which permits a lawsuit on behalf of deceased people for monetary damages. ERISA only has provisions that have been held applicable to equitable relief, but not for monetary damages. Charlotte, and people like her, under the existing interpretation of the law, are denied the right to recover monetary damages after their death even though their death was caused by a breach of fiduciary obligation, breach of contract, negligence or a variety of other state court claims. The reason for this denial is that ERISA has been held by the Supreme Court to pre-empt all state court statutory and common law remedies.

The basic questions involved in the case at bar are two-fold and they are as follows:

(1) Does ERISA call for mandatory pre-emption of state law and common law remedies involving the ability of a Plaintiff to bring a lawsuit against a health care organization for breach of contract or for negligence or for improper administration or for breach of fiduciary obligations or other causes of action of a similar nature; and

(2) Whether or not the Federal Courts have the right and/or obligation under ERISA to establish a federal common law in instances where ERISA provides no relief.

The two leading cases in this area are *Pilot Life Insurance Company v. Dedeaux,* 48 U.S. 41, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987) and *Massachusetts Mutual Life Insurance Company, et al. v. Russell,* 473 U.S. 134, 87 L. Ed. 2d 96, 105 S. Ct. 3085 (1985). Those two cases established a very clear principle of law. Those two cases stated, in essence, that ERISA pre-empts the state court and state common law remedies; and, in addition, ERISA provides no remedy for monetary damages under circumstances when the party Petitioner (Charlotte) has deceased.

There is no real split in the Circuit Courts. The Circuit Courts have been following the decisions of the Supreme Court. However, in many, many cases, the Circuit Courts and/or the Trial Courts have expressed a dismay at having to rule against the party Petitioner. Even in the case at bar, the Trial Court used the word "sadly" in describing its feelings in ruling against the Petitioner. Furthermore, lawyers all over the United States have attempted to chip away at the doctrines espoused in the aforesaid two leading cases. As a result, there are numerous cases which have struggled to make distinctions which strain the imagination and legal reasoning. There have been cases which have attempted to transform situations such as the situation involving Charlotte into malpractice cases or into a case involving violation of the American Disabilities Act because

those causes of action do not appear to be involved in the pre-emption doctrine. Some of these cases strain credulity. In an effort to obtain relief for their clients, lawyers all over the country are attempting to be innovative when innovation should not be necessary.

The rationale for the aforesaid pre-emption argument was based on the *Massachusetts Mutual* case and the *Pilot Life* case. Let us examine those cases because they involve fact situations that were not nearly as dramatic and compelling as the many cases that have come before the Court since those two decisions.

In the *Massachusetts Mutual* case the facts involved a woman who was a beneficiary under two employee benefit plans that were governed by ERISA. She originally brought her lawsuit based on interruption in benefits for approximately six months. Although she ultimately received her benefits, she sued alleging a breach of fiduciary duty based on the allegedly improper refusal to pay benefits during the period in question and she sought to hold the employer, as a fiduciary, personally liable for extracontractual compensatory and punitive damages. The Supreme Court held that ERISA did not provide for extracontractual compensatory or punitive damages caused by the improper or untimely processing of benefit claims. The decision was written by Justice Stevens. However, there was a very important concurrence by Justices Brennan, White, Marshall and Blackmun. In the concurrence, the Justices stated very clearly that they were not ruling on to what extent extracontractual damages were available. This question had not been addressed by the courts below and was not briefed by the parties.

The concurring Justices were quite clear that they did not agree with any interpretation of the majority decision which would or could be held to limit certain forms of action against fiduciaries. Those Justices stated as follows on page 109:

> Moreover, some of the Court's remarks are simply incompatible of the structure, legislative history, and purposes of ERISA. The Court's ambiguous discussion is certainly subject to different readings . . .

In the *Pilot Life* case the Court dealt with a fact situation involving an employee who began to collect permanent disability benefits under a long term disability benefit plan by purchasing a group insurance policy. After two years the insurance company terminated the employee's benefits then reinstated and terminated the benefits several times during the following three years. The Supreme Court, reversing the Court of Appeals, held that ERISA pre-empted state common law tort contracts action for a variety of reasons.

Thus, the two cases which provided the language upon which the lower courts built an impenetrable pyramid of pre-emption logic were based on cases that did not involve deaths or significant tragedies such as the case at bar and the many, many other cases which have since come before the Supreme Court and other federal courts. This appears to be a classic case of language used to correctly support the logic in the *Massachusetts Mutual* case and *Pilot Life* case having been used altogether too literally to rule on more sophisticated cases.

Succeeding courts throughout the federal system built on the language of those two cases. Succeeding decisions which reached the Supreme Court built on the language of the Pilot case and the language of the *Massachusetts Mutual* case until what started off as basically sound decisions on non-controversial fact situations became hard-bound law applicable to sophisticated and complex fact situations. This was not, and certainly should not have been, the intention of the Supreme Court when it made the decisions in the *Pilot Life* case and the *Massachusetts Mutual* case.

The basic fact situation which is present in the case at bar, and present in over a hundred cases throughout the country in the last few years, involve an insured person in a managed care plan or under an HMO administered plan who is denied medical treatment by the administrators of the plan. The allegation is that the administrators administered the plan improperly or negligently or committed a breach of fiduciary obligations or breached a contract, or all of the above. The patient would have no trouble in bringing a lawsuit under ERISA to force the provider to give the patient the treatment required under the appropriate plan documents. That is normal equitable relief. The problem occurs when the patient dies before the patient has had an opportunity to go to the Court for equitable relief. The patient's death may well have been caused by the exact same causes of action that would have permitted the Petitioner to obtain equitable relief if the Petitioner had gone to Court when the Petitioner was alive and when the Petitioner was still eligible for treatment. But when the Petitioner has failed to do the foregoing, on the same set of facts the Petitioner is denied relief for monetary damages.

These circumstances are far removed from the purposes for which ERISA was formed. This set of facts is an affront to common sense and to the people of this country who believe that ERISA was meant to serve them and to serve them fairly and equitably.

Apparently the basic legal theory brought about by the *Pilot Life* case and the *Massachusetts Mutual* case is that ERISA was presumably all encompassing and it did not specifically state that one could sue for monetary damages under the terms of ERISA. The Supreme Court correctly stated that it did not specifically provide for monetary damages but the Supreme Court probably erred in making a determination that it was by congressional intent. It would be next to impossible to envision

a congressman or senator who would take credit for passing a statute deliberately intending to place citizens in the position of Charlotte, who died before being able to seek equitable relief, from obtaining monetary relief.

There have been clear indications from the Supreme Court that some of the Justices are unhappy with the present situation and that they recognize the somewhat tragic situation that the gradual interpretation of the *Pilot Life* case and the *Massachusetts Mutual* case has brought about. This Court is referred to the following:

1. In a strongly worded dissent in the case of *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 121 L. Ed. 2d 513, 113 S. Ct. 580 (1992) Justice Stevens stated that there is a burgeoning volume of litigation involving ERISA pre-emption claims and that it is time to take a fresh look at the intended scope of the pre-emption provision that congress enacted. It is to be noted that Justice Stevens was the Justice who wrote the majority decision for the *Massachusetts Mutual* case. Justice Stevens stated that common sense should not be left at the Courthouse door. This Court is specifically referred to the following quotation by Justice Stevens at 121 L. Ed. 2d at page 524:

> Thus the federal statute displaces state regulation in the field that is regulated by ERISA; it expressly disavows an intent to supersede state regulation of exempt plans; and its text is silent about possible pre-emption or state regulation of subjects not regulated by the federal statute. *Thus, if we were to decide this case on the basis of nothing more than the text of the statute itself, we would find no pre-emption* (more precisely no "supersession") of the District's regulation of health benefits for employees

> receiving worker's compensation *because that subject is entirely unregulated by ERISA.* [emphasis supplied]

2. This Court's attention is also referred to the case of *California Division of Labor Standards Enforcement v. Dillingham Construction Co. N.A Inc., et al.*, 519 U.S. __, 136 L. Ed. 2d 791, 117 S. Ct. __ (1997). Justice Scalia, in a decision with which Justice Ginberg joined, discussed the influx of cases regarding the interpretation of ERISA and its pre-emption of state law. Justice Scalia argues that one should not do *"obeisance to all our prior cases, instead of acknowledging that the criteria set forth in some of them have in effect been abandoned"*. Justice Scalia stated that the portion of ERISA known as the "relate to" portion (the "relate to" theory means that anything that relates to ERISA is pre-empted) is a failure. He stated that the statutory test is an illusory test unless the "Court is willing to decree a degree of pre-emption that no sensible person could have intended — which it is not". Justice Scalia said as follows:

> I think it would greatly assist our function of clarifying the law *if we simply acknowledged that our first take on this statute was wrong; that the "relate to" clause of pre-emption provision is meant, not to set forth a test for pre-emption, but rather to identify the field in which the ordinary "field pre-emption"* applies — namely the field of laws regulating "employee benefit plans described in section 1003(a) of this title —" [citation omitted]. [emphasis supplied].

Justice Scalia went on to say that he does not believe that congress intended to alter traditional pre-emption analysis and that ordinary field pre-emption is what is supposed to be applicable to ERISA. Ordinary "field pre-emption" has

previously been defined as permitting pre-emption of a federal statute when the area covered by the statute totally covers the entire field. *See Service Engineering Co. v. Emmery,* 100 F.3d 659 (9th Cir. 1996). Clearly ERISA does not occupy the entire field of common law remedy involved in the case at bar and it certainly does not occupy and cover the field of monetary damages because ERISA does not even mention monetary damages.

3. The Court is also referred to the fact that in the decision of the First Circuit in the case at bar there is a concurring opinion from Senior Circuit Judge Hill which states, in essence, that Charlotte's remedy is a remedy to be provided by the legislative branch. The Court is also referred to *Andrews-Clarke v. Travelers Co.*, 1997 W.L. 677932 (D. Mass.), 21 Employment Benefits Cases 2137. In deciding this case District Court Judge William G. Young describes the current state of the law involving the issues discussed in this brief as "ridiculous" and issued a strong appeal to congress to amend ERISA so that patients may sue for wrongful death or personal injuries caused by improper refusal of an insurer to authorize treatment.

The decision is a blistering indictment of the present interpretation of the *Pilot Life* and *Massachusetts Mutual* cases. But the argument set forth by Judge Hill and Judge Young is an argument for legislative relief rather than judicial relief. The Petitioners's contention in the case at bar is that the relief is not required from the legislature in order to correct an inaccurate interpretation of ERISA; but the relief is required by a judicial acknowledgement that cases with fact situations such as the case at bar were never meant to be included in the pre-emption sweep of ERISA for at least two reasons. These reasons are: (1) that ERISA nowhere mentions the ability or lack of ability to obtain monetary damages under circumstances involving death by negligence and therefore field pre-emption is not applicable;

and (2) the mere fact that ERISA permits or ordains that the federal courts institute a federal ERISA common law is a clear acknowledgement that there is an area of general law that was not covered or ordained or mandated by the scope of ERISA. The Court is referred back to Justice Stevens' reference to worker's compensation. The unfortunate decision in cases such as the case at bar is that legislation is not necessary to rectify what is an inherent error of interpretation of ERISA which started off in 1985 and 1987 as sound judgment on certain sets of facts but which has grown like topsy to become a detriment to justice and fair play.

CONCLUSION

Based on the above, it is respectfully submitted that the Writ of Certiorari should be granted and that the Supreme Court be allowed to revisit the *Pilot Life* case and the *Massachusetts Mutual* case.

Respectfully submitted,

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